

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS LAMONT MCMURTRY,

Defendant-Appellant.

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UNPUBLISHED

February 1, 2005

No. 249441

Kent Circuit Court

LC No. 02-011387-FH

Before: Meter, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of larceny from a person, MCL 750.357, entered after a jury trial. We affirm.

Complainant and a witness identified defendant as the person who took complainant's wallet from her hand. On cross-examination a detective testified that defendant was arrested sixteen days following the incident. On redirect examination the prosecutor inquired if defendant had a known address at the time of the incident. The detective replied that he believed that defendant lived "on the street" at that time. Defendant denied taking complainant's wallet. He maintained that he was self-employed, and that he lived with his mother.

Defendant argues that the prosecutor engaged in misconduct and denied him a fair trial by eliciting testimony that the detective believed he was homeless at the time the incident occurred and by suggesting that his economic status motivated him to commit the offense.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel"

guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

Generally, an unresponsive, volunteered answer that injects improper evidence into a trial does not deny the defendant the right to a fair trial unless the prosecutor knew in advance that the witness would give the unresponsive testimony, or conspired with or encouraged the witness to give the testimony. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). However, police officers have a special duty to refrain from making prejudicial and irrelevant remarks during their testimony. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983).

Defendant did not object to the prosecutor's question or comments; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The prosecutor's question regarding defendant's address at the time of the incident was designed to explain the reason for the delay in arresting defendant after he had been identified by two persons, and was proper. *Noble, supra*. Nothing on the record indicates that the prosecutor knew in advance that the detective would give an answer that suggested that defendant was homeless. *Griffin, supra*. During rebuttal closing argument the prosecutor noted inconsistencies in defendant's testimony regarding his employment, but did not suggest that defendant should be convicted because he was arguably underemployed at the time of the incident. The prosecutor's remarks, viewed in context, were proper. *Schutte, supra*. Any prejudice created by the prosecutor's question to the detective regarding defendant's address or the prosecutor's remarks during rebuttal closing argument could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). No plain error occurred. *Carines, supra*.

Defense counsel's failure to object either to the prosecutor's question to the detective or the prosecutor's remarks during rebuttal closing argument likely was trial strategy to minimize the effect of the remarks. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Defendant has not established that any error by counsel resulted in prejudice. *Carbin, supra*.

Affirmed.

/s/ Patrick M. Meter  
/s/ Kurtis T. Wilder  
/s/ Bill Schuette